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IN THE

Supreme Court of the United States

October Term, 1959.

No. 191

JERRY GIRARDI,

Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY
and
LIPSETT, INC.,

Respondent,

v.

ANDERSHONIS, INC.,

Respondent.

ANSWER OF RESPONDENT, LIPSETT, INC., TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Respondent, Lipsett, Inc., by its attorneys respectfully make answer to the petition for Writ of Certiorari as follows:

COUNTER-STATEMENT OF QUESTION PRESENTED.

Where a District Court leaves to a jury, from all the evidence in the case, the determination as to whether the general contractor had been relieved by the owner of its duty and right of control, and whether the owner had accepted a subcontractor as the sole responsible party in the place and stead of the general contractor, has not the petitioner-plaintiff received the benefit of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States?

RESPONDENTS' STATEMENT OF THE CASE.

The petitioner brought suit for personal injuries against the Pennsylvania Power & Light Company (P. P. & L.) and Lipsett, Inc. (Lipsett). Lipsett filed an Answer alleging that it was the petitioner's statutory employer, and joined the respondent, Andershonis, Inc. (Andershonis), the petitioner's direct employer, as a third-party defendant. Prior to trial, the action was dismissed as against P. P. & L. due to lack of diversity of citizenship between that defendant and the petitioner. Following the trial, pursuant to Answers made by the jury to special Interrogatories sub-

mitted to them by the trial judge, relating to the question of statutory employment, the Court entered judgment for the defendant, Lipsett. Motions for new trial and for judgment in the petitioner's favor were overruled by the District Court. On appeal to the United States Court of Appeals for the Third Circuit, the judgment of the District Court was affirmed.

The facts giving rise to this occurrence, and the relationship between the parties are as follows:

P. P. & L., being desirous of removing certain equipment and demolishing certain buildings and other structures at four of its steam electric stations in Pennsylvania, received an offer of $100,000 from Lipsett, a demolition contractor, for the equipment and materials to be derived from the demolition of those stations. Thereupon it wrote a letter to Lipsett on November 5, 1954, accepting Lipsett's offer to purchase the equipment at the Allentown, Kulpmont, Lykens, and Williamsport steam electric stations of P. P. & L., and to demolish and remove certain buildings and other structures as expressly stated in the said letter. By the terms of the letter (Exhibit D-1, 150a), which were accepted by Lipsett, Lipsett was required, with regard to the Williamsport station, to remove all equipment, demolish the building and two smoke stacks, and dispose of the resulting debris to the P. P. & L. Company's satisfaction by April 1, 1956; Lipsett was also required to furnish a bond for the faithful performance by it "or any subcontractor that may remove the aforementioned equipment or demolish the building at Williamsport" (152a).

Lipsett thereupon entered upon the performance of this contract, but before it was completed, entered into a contract with Andershonis, a subcontractor (96a), to demolish the Williamsport Power Plant and two smoke stacks, to remove the debris, and to grade the area to the satisfaction of P. P. & L. (Exhibit P-1, 153a). Lipsett then discon-

tinued work at the Williamsport plant some time in July, 1955, and in August, 1955, Andershonis commenced work under its subcontract and thereafter continued with the demolition and the shipping out of material under direction from Lipsett until the prime contract was completed to the satisfaction of P. P. & L. It was on November 4, 1955, while Andershonis was performing the work under its subcontract with Lipsett, that the petitioner, an employee of Andershonis, was injured while engaged in his employment under that subcontract. The petitioner alleged and the jury found that while Lipsett had been engaged in the demolition work prior to August of 1955, its employees had burned or cut certain U-bolts, which held some heavy slate panels upright on a rack, and had left the panels in this precarious position with the result that they fell and struck the plaintiff while he was working nearby. The jury also found that Andershonis was negligent, presumably for failure to provide a safe place for its employees to work. These findings of fact by the jury are not questioned.

It was established of record that the parties had accepted the provisions of the Pennsylvania Workmen's Compensation Act and that the petitioner was receiving Workmen's Compensation under that act from the insurer of Andershonis.

All these facts were the subject of proofs adduced by the petitioner, with the single exception of the principal contract between P. P. & L. and Lipsett, which was offered in evidence by the respondent, Lipsett, without formal proof, and was agreed to as authentic by the petitioner.

The petitioner contended that Lipsett was not a statutory employer because it had left the premises, and Andershonis had been accepted by P. P. & L. as the contractor to complete the work in lieu of Lipsett. The trial judge accordingly submitted two Interrogatories to the jury, which were answered as follows (146a):

"'A. Does the evidence in this case satisfy you by a fair preponderance thereof in accordance with the instructions given to you, and do you find

"1. That Pennsylvania Power & Light Company released Lipsett, Inc. from its obligation to complete the contract of November 5, 1954, relating to the Williamsport, Pennsylvania, job and accepted Andershonis, Inc. as sole responsible party to complete said contract?

"A. No.

"2. That Lipsett, Inc., retained the right to control the work necessary to complete its contract with Pennsylvania Power & Light Company in accordance with the terms of the contract of November 5, 1954?

"A. Yes."

On the basis of these answers, judgment was entered in favor of the defendant, Lipsett.

REASONS FOR DENYING THE WRIT.

1. The requirement as to jury trial contained in the Seventh Amendment to the Constitution was satisfied.

2. The judgment is not in conflict with the decisions in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958), or *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959).

ARGUMENT.

In the District Court the contentions of the parties were perfectly clear-cut:

1. Was petitioner's injury caused by the negligence of the respondent, Lipsett, or by that of the respondent, Andershonis, or by that of both? The jury found that both respondents caused the injury by their concurrent negligence.

2. Was the respondent, Lipsett, the petitioner's statutory employer? The jury's Answers to special Interrogatories established that it was.

I.

The Decision Below was Clearly Correct.

The controversy between the parties at trial turned on the proper interpretation of Section 203 of the Pennsylvania Workmen's Compensation Act wherein a statutory employer is referred to as a general contractor who "permits the entry upon premises occupied by him or under his control of a laborer" hired by a subcontractor. The petitioner contended that this clause required that the general contractor must be actually exercising control; the respondents took the position that a general contractor's *right* to control determined his status as a statutory employer, and brought him within the Workmen's Compensation Act. The respondents' interpretation was adopted by Judge Kirkpatrick of the Court below in his Opinion on a Motion for Summary Judgment (43a); by Judge Clary in his Opinion

Denying the Petitioner's Post-Trial Motions (166a); and by the United States Court of Appeals in its Opinion affirming the judgment of the lower Court (Petition, Page 14a). The petitioner now no longer contests the test of "right of control". (Petition, Page 9). The sole question petitioner raises in this Court is the District Court's ruling on a point for charge submitted by the respondent, Lipsett (159a):

> "3. The fact that none of Lipsett's employees remained at the plant after Andershonis commenced work under his subcontract has no bearing on the statutory employer status of Lipsett. As a matter of law, any general contractor has the right to limited direction, in order to assure desired results. (Waggaman v. General Finance Company, 116 F. 2d 254.)"

The Court affirmed and read to the jury only the first sentence of this point. The point was submitted, of course, to point out to the jury that it was not *actual* control, or physical presence on the premises, which determined the respondents' status, but the *right* to control. The petitioner, misunderstanding the purpose and intent of the instruction, then took exception (144a):

> "Mr. Richter: May we please take exception to that last reading of the defendant's point that the fact that none of Lipsett's men remained is not evidence of no right to control."

The Court, by way of reply, had the reporter read the full instruction as follows (144a, 145a):

> "Members of the jury, the fact that none of Lipsett's employees remained at the plant after Andershonis commenced work under his subcontract has no bearing on the statutory employer status of Lipsett. The point that I made and I am leaving with you is this: It is

> the right of control that governs. The testimony is that Lipsett's employees as such were not there after a certain day and that the contract was in fact completed. That is the testimony in the case, was in fact completed, and Andershonis apparently—there is no testimony to the contrary—completed Lipsett's obligation, which Lipsett provided in its contract with Andershonis, to the satisfaction of the Pennsylvania Power and Light."

Not only does this instruction clearly leave it to the jury to say, based on *all* the evidence in the case, whether Lipsett retained the right to control, but in the charge proper, *all* facts were left to the jury. At Pages 133a and 134a, the trial judge carefully explained the petitioner's contentions as follows:

> "Ordinarily, that would appear to create the statutory situation when the injured man, Jerry Girardi, was hurt. I say it would ordinarily do it. However, the plaintiff in this case has said no, that is not so; Lipsett is not the statutory employer and he is not the statutory employer because the evidence in this case is such as to satisfy the jury that the Pennsylvania Power and Light released Lipsett from its obligation and accepted Andershonis as the sole responsible party. He said that in that respect Lipsett has failed in his burden of proof. Secondly, he said that Lipsett had neither occupancy of the premises or control of the premises and therefore does not come within the act. You remember I read to you, 'premises occupied by or under his control,' and he said he did not retain any right to control."

The trial judge then concluded that explanation with the statement (134a):

"Members of the jury, I am leaving it to you, *from all four corners of the case*, to determine those questions which I have just posed." (Emphasis supplied.)

From these excerpts from the charge and ruling, it is apparent that the trial judge made plain to the jury beyond all question, that Lipsett's absence from the premises at the time of the injury was of no importance; that the only question for their determination was whether Lipsett still retained the *right* to control the work—that *absence* from the premises, which Lipsett admitted, was not the issue in the case; the issue was *right* to control, which the jury was to decide "*from all four corners of the case.*"

We can conceive of factual situations in which the general contractor's absence from the premises might tend to prove relinquishment of control. If there had been evidence that, although Lipsett had hired the subcontractor, Andershonis, it had then defaulted in payments on account to Andershonis, and the owner, P. P. & L., had then dealt directly with Andershonis, supervised his work, and had made payments direct to him, or Andershonis had bought the remainder of the scrap, Lipsett's withdrawal from the premises would have to be viewed in a much different light. Lipsett's absence, in such circumstances, could be held by the jury to be consistent with the plaintiff's contention that it had abandoned its principal contract and had acquiesced in the substitution of Andershonis as the direct contractor with the owner. But, as we have said, all the evidence in the case was offered by the petitioner with the exception of the principal contract, which was admitted. That evidence established the principal contract and subcontract, the completion of the work by the subcontractor, the directions given by Lipsett to Andershonis during the progress of the latter's work with regard to shipment of scrap, and the payments by Lipsett to Andershonis according to the

terms of the subcontract. The petitioner's contention that a novation had taken place was not supported by a scintilla of evidence. The petitioner's present contention, therefore, that Lipsett's absence supports an inference that Lipsett lost his right to control is legally insupportable. No one can rid himself of his duty to exercise the right to control, in order to complete his contract, by simply absenting himself, and such a finding by a jury could not be allowed to stand. We contend, in fact, that there was no disputed fact for submission to the jury. But since the general contract was not offered in evidence in the petitioner's case, but was offered by the respondent, the trial judge, from an abundance of caution, submitted the whole question to the jury. It is respectfully submitted that the jury was freely permitted to consider *all* the facts in arriving at their verdict and that plaintiff's petition should be denied.

II.

There is No Conflict of Decisions.

The petitioner contends that the decision below is in conflict with the decisions of this Court in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958) and *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959).

In the *Byrd* case one of the respondent's affirmative defenses was that under the South Carolina Workmen's Compensation Act the petitioner had the status of a statutory employee and was, therefore, barred from suing the respondent at law. The District Court struck out the defense on the ground that the respondent was not a statutory employer if, as the proofs showed, the respondent's crews had built facilities only for the respondent. The Court of

Appeals disagreed and held that the statute granted immunity if the proofs established that the respondent's own crews had constructed lines and substations which, like the work contracted to the petitioner's employer, were necessary for the distribution of the electric power which the respondent was in the business of selling. But instead of ordering a new trial at which the petitioner might offer his own proof, the Court of Appeals made its own determination on the record and directed judgment for the respondent. This Court held that since the District Court had struck out the statutory employer defense, there was no occasion at the trial for the petitioner to offer evidence to refute it; and that when the Court of Appeals entered judgment for the respondent, it thus deprived the petitioner of the opportunity of offering evidence; that even if the petitioner offered no proof of his own, the respondent's evidence, although sufficient to withstand the Motion to strike its defense of statutory employer, nevertheless presented a fact question which, in the circumstances of that case, was for the jury. It will be seen at once that this case was decided in favor of the plaintiff petitioner because disputed questions of fact bearing upon the statutory employer question were decided as a matter of law by the Court of Appeals.

In the *Magenau* case, the defendant, an interstate motor carrier, leased a tractor trailer complete with driver from one Fidler, an independent contractor. Fidler was required by his contract to furnish a driver and keep the equipment in repair. He had authorized the driver, Schroyer, to hire services where the circumstances required. Schroyer accordingly, on a trip from Syracuse, New York, to Midland, Pennsylvania, hired the deceased plaintiff for $25 to accompany him on a portion of the trip, to aid in the event that he had tire or battery trouble. The questions arose during the trial (1) whether the deceased plaintiff, Ormsbee, was a trespasser or a licensee on the truck, and (2)

whether he was a statutory employee of the defendant. The trial judge submitted to the jury the following Interrogatory:

> "Question: Do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver, Schroyer, engage the decedent, Ormsbee, Jr., to accompany him for the remainder of the trip?"

The jury's answer was in the affirmative, and the Court of Appeals held that this answer classified the decedent as respondent's employee, placing him within the Workmen's Compensation Act. But the trial judge had, during the discussion of this Interrogatory, said "you notice I refrain from saying just what his (decedent's) status is. I don't think it necessary for the jury to find whether he was employed or not; I think that is a question for the law."

The decision of this Court was that the quoted instruction and answer returned by the jury warranted only the conclusion that the plaintiff was not a trespasser; that the trial judge had made it clear that the question of employment was one to be decided by him as a question of law, and not by the jury; and that the petitioner had, therefore, been deprived of the right of trial by jury as to the factual question of employment. We see no conflict between the decision in the *Magenau* case and the decision below.

CONCLUSION.

The Writ should be denied.

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